NO. 46205-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ADAM JONES
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

A. ASSIGNMENTS OF ERROR

1. Mr. Jones was unlawfully detained in violation of his privacy rights when an officer stopped him based on a hunch that he might have been involved in criminal activity in the general area where a burglary had occurred in the prior one to two months.

2. Mr. Jones was denied his right to an impartial jury trial where after suppressing evidence of Mr. Jones driving with a suspended license, the venire learned of this crime from a prior companion case trial.

Issues Presented on Appeal

1. Was Mr. Jones unlawfully detained in violation of his privacy rights when an officer stopped him based on a hunch that he might have been involved in criminal activity in the general area where a burglary had occurred in the prior one to two months?

2. Was Mr. Jones was denied his right to an impartial jury trial where after suppressing evidence of Mr. Jones driving with a suspended license, the venire learned of this crime from a prior companion case trial?

B. STATEMENT OF THE CASE

a. 3.6 Hearing

Officer Mat Schlecht was dispatched to an area where a home owner

at 330 Yates Rd. reported a suspicious van in her driveway at 5:26 am. RP1 4, 11. The homeowner came outside and approached the van driven by Mr. Jones, who when he realized he was in the wrong home, made an apology, "sorry ma'am", and left the driveway. RP 3, 4, 9. The homeowner provided the police with a partial license plate of the van. RP 4-5, 9.

Officer Schlecht saw a car matching the description of this van near Yates Rd. and pulled in behind the van and ran the license plates. RP 5. Officer Schlecht testified that he stopped the van because:

> knowing that in the recent past, within the last month to two months, we've have numerous burglaries in the greater Chehalis area where there were a lot of early morning daytime burglaries when homeowners were gone -- they pull in, check, break in and steal items -- I felt like this might be what was going on or somebody in the area casing properties, because they were coming down off of Pattee Road, which is a dead-end road, so I made a traffic stop on the vehicle to determine if a crime had or was going to occur.

RP 6.

Officer Schlecht did not know what type of car was involved in the prior burglaries or where they occurred in the greater Chelan area. RP 9.

b. Relevant Trial Facts

Officer Schlecht arrested Mr. Jones and asked him why he stopped at the home on Yates Rd. Mr. Jones informed officer Schlecht that he was

---

1 RP refers to the verbatim report of the 3.5 proceedings.

looking for a friend's home but could not provide a name. 1RP 30.2 Officer Schlecht searched Mr. Jones jeans coin pocket where he retrieved a small vile with a white substance later analyzed to be methamphetamine. 1RP 30, 32, 41-42. Mr. Jones was charged and convicted of unlawful possession of methamphetamine. CP__

c. Motion to Strike Jury Panel

To avoid undue prejudice, Mr. Jones successfully moved to suppress evidence that he was arrested for DWLS. RP 12. Following that motion, on the morning of trial, the defense moved to strike the jury panel because Mr. Jones' co-defendant Cassandra Anderson was tried by the same judge and the same jury panel present for Mr. Jones case. RP 11-12. The judge denied the motion to strike the jury panel for prejudice. RP 12-13.

Defense counsel explained that he did not know which jury panel would be assigned to his next case until he retrieved that document from the clerk's office that morning RP 12. Judge Lawler too stated that he had no way of knowing about companion cases unless informed by counsel. Id. Judge Lawler who presided over Ms. Anderson's case, denied the motion in Mr. Jones case because:

> I looked at my notes from the testimony that was given. testimony was really -- it was very, very brief. We

2 1RP refers to the verbatim report of the trial proceedings.

basically have the introductory evidence from Deputy Schlecht saying that there was a suspicious vehicle call, I stopped the vehicle, there was three people, he took the driver out of the vehicle for driving while suspended, male passenger had a warrant and then the defendant was left in the car and then Deputy Almond contacted the defendant, being Ms. Anderson, in that case. And then Deputy Almond testified about his contact with Ms. Anderson and the search of the backpack and it was separate from the other people. So what the jury has heard would be the basic background information that they are going to hear in any event. So I'm going to deny the request given that the testimony that they heard was from someone else, they're going to have the same basic information here in any event, together with the fact that this motion is late being brought 15 minutes before we're supposed to bring the jury in here. The jury's already here. Counsel has some obligations to make sure if you are concerned about that, that that be done ahead of time. I'm not going to send a jury out of here just because of this, especially when the testimony we're looking at here is quite limited.

RP 12-13.

C. ARGUMENTS

1. THE POLICE IMPERMISSIBLY STOPPED MR. JONES WITHOUT REASONABLE ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY IN VIOLATION OF THE PARAMETERS OF A TERRY3 STOP.

---

3 *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Officer Schlecht lacked reasonable articulable suspicion of criminal activity to justify the detention, search and seizure of Mr. Jones based on his presence in the greater Chelan area that had some burglaries a month or two earlier, and where Mr. Jones merely drove up a driveway looking for a friend's house and left with an apology as soon as he realized his mistake.

a. Fourth Amendment and Article 1 s. 7.

"The Fourth Amendment to the United States Constitution protects against unlawful search and seizure." (U.S. CONST. amend. IV); *State v. Doughty,* 170 Wn. 2d 57, 61, 239 P. 3d 573 (2010) (footnote omitted). Article I, section 7 of the Washington Constitution ((Const. art. I, § 7) protects against unlawful government intrusions into private affairs. *Id.* A seizure occurs when, considering all of the surrounding circumstances, a reasonable person would not feel free to leave. *State v. Richardson,* 64 Wn.App. 693, 696, 825 P.2d 754 (1992) (quoting *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). This includes situations involving traffic stops. *Doughty,* 170 Wn. 2d at 62.

One exception to the prohibition on warrantless seizures is a law enforcement officer's investigatory stop of a vehicle if he or she has a reasonable suspicion to believe that criminal activity is indicated. *State v.*

Little, 116 Wn.2d 488, 497–98, 806 P.2d 749 (1991). The State must establish the exception by clear and convincing evidence. *Garvin,* 166 Wn.2d 247, 250, 207 P.3d 1266 (2009).

b. Terry Stop

To be lawful, an investigatory stop, also referred to as a *Terry* stop, must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry,* 392 U.S. at 21, 88 S.Ct. 1868. The standard for articulable suspicion is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct." *Doughty,* 170 Wn. 2d at 62. "A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." *Doughty,* 170 Wn. 2d at 62.

An investigatory stop must be justified at its inception. *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d *591 426 (2008). A court must consider the totality of the circumstances surrounding the investigatory stop to evaluate reasonableness. *State v. Glover,* 116 Wn.2d 509, 514, 806 P.2d 760 (1991). In particular, the experience of the officer, the location of the stop, and the conduct of the defendant are factors used to determine if the

officer's suspicions are reasonable. *Id.*

Terry does not authorize a search for evidence of a crime; rather, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful *Terry* stop, "a reasonable safety concern exists to justify the protective frisk for weapons" so long as the search goes no further than necessary for protective purposes. *State v. Duncan,* 146 Wn.2d 166, 172, 43 P.3d 513 (2002). This brief, nonintrusive search is often referred to as a "*Terry* frisk." *E.g., State v. Glossbrener,* 146 Wn.2d 670, 680, 49 P.3d 128 (2002).

Terry applies to traffic infractions. *State v. Johnson,* 128 Wn.2d 431, 454, 909 P.2d 293 (1996) (citing *United States v. Ross,* 456 U.S. 798, 806–07, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)). But if the initial stop is not lawful or if the search exceeds its proper bounds or if the officer's professed belief that the suspect was dangerous was not objectively believable, then the fruits of the search may not be admitted in court. *Glossbrener,* 146 Wn.2d at 682; *Kennedy,* 107 Wn.2d at 9.

c. Standard of Review

On review of the denial of a motion to suppress, this court must determine "whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *Garvin,* 166

Wn.2d at 249. Substantial evidence is "enough 'to persuade a fair-minded person of the truth of the stated premise.' " *Garvin,* 166 Wn.2d at 249. (quoting *State v. Reid,* 98 Wn.App. 152, 156, 988 P.2d 1038 (1999)).

A trial court's conclusions of law following a suppression hearing are reviewed de novo. *State v. Bailey,* 154 Wn.App. 295, 299, 224 P.3d 852, *review denied,* 169 Wn.2d 1004, 236 P.3d 205 (2010). Further, the question of whether an investigatory stop, or warrantless seizure, is constitutional is a question of law reviewed de novo. *Id.; see also Terry v. Ohio,* 392 U.S. at 21; *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010).

d. Illegal Terry Stop

Mr. Jones does not dispute the facts presented at trial, that he pulled into a driveway at 5:26 am looking for a friend's house and when approached by the home owner realized he had the wrong address and said "sorry ma'am" and left the driveway. RP 6, 9. However, based on this limited interaction, the police did not have reasonable articulable suspicion that Mr. Jones was committing a crime when he was pulled over. RP 6, 9.

State v. Doughty, is legally on point. In *Doughty*, the police stopped Mr. Doughty's car after he briefly visited a suspected drug house at 3:20 a.m. *Doughty,* 170 Wn. 2d at 60. In the past, Neighbors and an informant had told the police that the house was used to distribute drugs. *Doughty,* 170 Wn. 2d

at 60. The officer who saw Mr. Doughty exit the house and drive off, ran a records check that revealed that Mr. Doughty's license was suspended. The officer then arrested Mr. Doughty and searched his car where he found a pipe containing methamphetamine residue. Methamphetamine was also found in Mr. Doughty's shoe at booking. *Doughty,* 170 Wn. 2d at 60. The trial court denied Mr. Doughty's motion to suppress, and he was convicted of one count of possession of methamphetamine. *Doughty,* 170 Wn. 2d at 61.

The Supreme Court concluded that the officer's actions were based on his own "incomplete observations." *Doughty,* 170 Wn. 2d at 64. The court reviewed the totality of the officer's observations and knowledge as follows:

> [P]olice never saw any of [Mr.] Doughty's interactions at the house.... The two-minute length of time [Mr.] Doughty spent at the house— albeit a suspected drug house— and the time of day do not justify the police's intrusion into his private affairs.

Doughty, 170 Wn. 2d at 64. The Supreme Court reversed the trial court, and held that the officer lacked sufficient specific and articulable facts to seize Mr. Doughty. The Court suppressed the evidence because the *Terry* stop was unlawful. *Doughty,* 170 Wn. 2d at 64-65.

Doughty is legally indistinguishable from Mr. Jones case. Here, Officer Schlecht no observation of any suspicious activity at all. He only

knew that Mr. Jones had driven up a driveway at 5:26 am, spoke with the home owner and left with an apology when he realized that he had the wrong house. RP 6, 9.

This information is innocuous and far less than the information available to the officer in *Doughty* who knew that Doughty had briefly entered a drug house in a high crime area at 3:00am. The Court held that this alone was not sufficient to establish illegal activity. *Doughty*, 161 Wn2d at 64-65. Here, Mr. Jones was not driving in the middle of the night, the area was not a high crime area, there was no evidence that a burglary had occurred in this area within a month or two, and Mr. Jones did not linger or drive around with his light off.

Officer Schlecht only knew that he drove up the wrong driveway at 5:26 in the morning and left with an apology and that a burglary had occurred in the greater Chelan area a month or two before the date Mr. Jones was stopped. In *Doughty*, the Court held that the time of day did not justify the stop, nor did the fact that Doughty entered a drug house for two minutes. The same applies here.

Under *Terry* and *Doughty*, under the totality of the circumstances, the evidence available to officer Schlecht was insufficient to establish a reasonable, articulable suspicion that Mr. Jones was involved in criminal

activity. Subsequently, because the initial stop was not lawful the fruits of the search, the methamphetamine, should have been suppressed. *Doughty*, 161 Wn2d at 64-65; *Glossbrener,* 146 Wn.2d at 682, 684–85; *Kennedy,* 107 Wn.2d at 9. This Court should reverse and remand for suppression and dismissal, because without he methamphetamine, the state cannot move forward with the possession charge.

2. MR. JONES WAS DENIED HIS CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY BY THE TRIAL COURT'S DENIAL OF HIS MOTION TO STRIKE THE SAME JURY VENIRE USED IN A SEPERATELY TRIED COMPANION CASE.

Mr. Adams was arrested in his car with two passengers. One of the passengers, Casandra Anderson was tried before the same jury venire, one to two weeks before Mr. Adams. On grounds of undue prejudice, the trial court in Mr. Adams case suppressed the fact that Mr. Adams was arrested for driving with a suspended license, but the same jury venire in Ms. Anderson's case learned that Mr. Adams was arrested for that crime, thus undermining the trial court's suppression order. The trial court's failure to strike the jury venire violated Mr. Adams constitutional rights to a fair trial, an impartial jury, and the presumption of innocence.

a. <u>Constitutional Right To Impartial Jury</u>

Both the federal and state constitutions provide a criminal defendant the right to trial by an impartial jury. U.S. CONST. amend. VI; Const. art. I, § 22 (amend.10). *State v. Roberts*, 142 Wn.2d 471, 517, 14 P.3d 713 (2000); *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996). This requires that jurors remain "'indifferent,' ' *Morgan v. Illinois,* 504 U.S. 719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (construing U.S. CONST. amend. VI), or "unbiased and unprejudiced," *State v. Davis,* 141 Wn.2d 798, 824, 10 P.3d 977 (2000) (construing Const. art. I, § 22 (amend.10)). The trial court assesses juror impartiality. *State v. Noltie,* 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

The state and federal constitutions also guarantee due process and a fair trial. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *see In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012).

b. Standard of Review

"The discretion of the trial court to determine partiality or impartiality in a jury is subject to review by the appellate court under the constitutional guaranty to the accused of a trial by an impartial jury." *State v. Fire,* 145 Wn.2d 152, 34 P.3d 1218 (2001) (quoting, *State v. Stentz,* 30 Wash. 134, 143, 70 P. 241, 243, 70 P. 241 (1902)) *abrogated on other grounds by, Fire*, 145

Wn.2d at 163); *Accord*, *McMahon v. Carlisle-Pennell Lumber Co.,* 135 Wn. 27, 28-29, 236 P. 797 (1925).

c. Mr. Jones Denied His Right to An Impartial Jury.

Despite the trial court's recognition that admission of Mr. Adams crime was overly prejudicial, the trial court nonetheless denied the motion to strike the jury venire which annihilated that protective ruling because the venire had learned of the crime from Ms. Anderson's trial.

In Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997), the Ninth Circuit Court of Appeals reversed a trial court's denial of a motion for a new venire. The defendant was charged with sexual conduct with a minor. *Mach*, 137 F.3d at 631. During voir dire, a prospective juror with a psychology background and employed as a social worker stated that in her three years as a State employed social worker, every allegation a child had made about sexual abuse was true. *Mach*, 137F.3d at 632.

The information was repeated upon further questioning. *Mach*, 137F.3d at 633. The trial court struck the juror but denied a motion for a new jury panel. Id. Reversing, the Ninth Circuit reasoned the statements made by the prospective juror were directly connected to guilt, and that "the court should have[, at a minimum,] conducted further voir dire to determine

whether the panel had in fact been infected by [the prospective juror's] expert-like statements.'" *Mach*, 137F.3d at 633.

Like the reversible error that tainted the jury venire in *Mach*, here, the entire venire learned of Mr. Jones prior DWLS during voir dire in Ms. Anderson's case. This knowledge like the knowledge in *Mach*, was directly connected to the perception of guilt as a criminal type. Moreover, counsel (and the court) could not have effectively questioned the prospective jurors about the effect of prior offenses without further opening the door that Mr. Adams had worked diligently to keep closed. "Even if 'only one juror is unduly biased or prejudiced,' [by the court or the prospective juror's comments] the defendant is denied his constitutional right to an impartial jury." *Mach*, 137 F.3d at 633 (quoting *United States v. Eubanks,* 591 F.2d 513, 517 (9th Cir. 1979)).

The proper remedy was to begin anew with a fresh jury pool. In *Mach*, the Ninth Circuit considered the error structural, but reversed the conviction and remanded for a new trial under the lesser, harmless error standard. *Mach*, 137 F.3d at 633-34. The same result is compelled here. The venire's knowledge of the prior DWLS from Ms. Anderson's trial tainted the prospective juror's ability to retain impartiality. This taint, however slight, denied Mr. Adams his constitutional right to an impartial jury because this

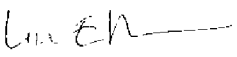
Court cannot determine that entire venire's information did not create bias or prejudice in at least one of the selected jurors. *Mach*, 137F.3d at 633 (citing, *Eubanks,* 591 F.2d at 517. This is particularly true where counsel successfully moved to suppress Mr. Adams prior DWLS to shield the jurors from such prejudicial evidence. The remedy here is to reverse and remand for a new trial.

D. CONCLUSION

Mr. Jones respectfully requests this Court reverse his conviction and remand for suppression and dismissal based on the illegal search and seizure and denial of an impartial jury venire.

DATED this 22nd day of August 2014.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gova true copy of the document to which this certificate is affixed, on August 22, 2014. Service was made by electronically to the prosecutor and Adam Jones DOC# 768258 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

_____Signature

ELLNER LAW OFFICE

August 22, 2014 - 1:16 PM

Transmittal Letter

Document Uploaded: 462052-Appellant's Brief.pdf

Case Name: State v. Adam Jones
Court of Appeals Case Number: 46205-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov